COMMONWEALTH OF MASSACHUSETTS
HOUSING APPEALS COMMITTEE

O.I.B. CORP.

v.

BRAINTREE BOARD OF APPEALS

No. 03-15

DECISION

March 27, 2006

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COMMONWEALTH OF MASSACHUSETTS
HOUSING APPEALS COMMITTEE

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DECISION

I. PROCEDURAL HISTORY

In July 2002, O.I.B. Corp. submitted an application to the Braintree Zoning Board of Appeals for a Comprehensive Permit pursuant to G.L. c. 40B, §§ 20-23 to build 118 condominium units of mixed-income affordable housing in duplex buildings on a 19-acre site on Whites Hill, off Liberty Street, in Braintree. Exh. 4-A. The housing is to be financed under the New England Fund of the Federal Home Loan Bank of Boston. Exh. 2, p. 1; 3, third page; 36. After due notice and public hearings, the Board unanimously denied the permit, filing its decision with the Braintree Town Clerk on June 9, 2003. From this decision the developer appealed to the Housing Appeals Committee.

On January 23, 2005, the Board moved to dismiss O.I.B.'s appeal based upon the town allegedly having met the statutory 1.5% general land area minimum. See G.L. c. 40B, ¶ 20; 760 CMR 31.04(2). Two evidentiary hearing sessions were held, and on July 13, 2004

the Committee's hearing officer issued a detailed ruling denying the motion and remanding the matter to the Board. Order Denying Board's Motion to Dismiss (Jul. 13, 2004). On remand, the Board again denied the permit by decision filed with the town clerk September 28, 2004, and this appeal was reactivated.

A group of eight Braintree residents had moved to intervene, and the presiding officer permitted several of them to participate solely on issues involving stormwater drainage.[1] Ruling on Motion to Intervene (Mar. 18, 2005).

On January 3, 2005, the Board renewed its Motion to Dismiss, and cited additional grounds. The Presiding Officer denied that motion on March 18, 2005. Ruling on Motion to Dismiss (Mar. 18, 2005). At the Board's request, the presiding officer reconsidered that ruling, but reaffirmed the denial on May 13, 2005. Reconsideration and Reaffirmance of March 18, 2005 Ruling on Motion to Dismiss (May 13, 2005).[2]

In June 2005, the Board brought an action in Superior Court seeking to enjoin the Committee's proceedings for lack of jurisdiction. The application for preliminary injunction was denied, and the Committee's motion to dismiss the complaint was granted. *Braintree v. O.I.B. Corporation, et al.*, No. CV05-00960 (Norfolk Super. Ct. judgment Oct. 6, 2005).

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1. After the ruling on the Motion to Dismiss, the hearing officer left the employ of the Committee, and the Committee's chairman assumed the role of presiding officer.

2. The Board filed a Renewed Motion to Dismiss for Lack of Jurisdiction with its post-hearing brief. The issues raised there are addressed in the previous rulings of the hearing officer and presiding officer, and also, briefly, in section III, below. As a general matter, such a motion is not timely since these issues are to be addressed prior to the evidentiary portion of the hearing or, in any case, should be included in the Pre-Hearing Order. See Pre-Hearing Order (Sep. 15, 2005), § III.

With its post-hearing brief, the Board also filed a motion for recusal of Committee member James G. Stockard, Jr. In response to the motion and pursuant to the Committee's Standing Order No. 05-02 (Avoidance of Appearance of Improper Influence, May 9, 2005), Mr. Stockard has declined to recuse himself.

The Committee then conducted its *de novo* hearing, receiving prefiled testimony from twelve witnesses (mostly expert witnesses), conducting a site visit, and holding two days of hearings in December 2005 to permit cross-examination.[3] Following the presentation of evidence, counsel submitted post-hearing briefs.

II. FACTUAL OVERVIEW

The developer proposes to construct 118 three-bedroom, duplex, condominium housing units on Whites Hill in Braintree. The 19-acre site is a nearly land-locked parcel located at the top of a hill. It is surrounded by houses that have frontage on Liberty Street, Linden Street, Pilgrim Road, and Mayflower Road. Exh. 4-A. Access to the site is proposed to be by construction of a roadway from the west off Liberty Street between two existing homes, and there is the possibility of emergency access from the northeast, at the opposite since of the site from Linden Street. Exh. 4-A. The new housing units will be spaced fairly evenly throughout the site along two internal roadways that are roughly in the configuration of the letter "Y." Exh. 4-A, 42, ¶4.

III. JURISDICTION

The Board put the developer to its proof with regard to two aspects of jurisdiction, namely the closely related requirements that the project be fundable by a subsidizing agency

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3. The presiding officer issued a joint Pre-Hearing Order, agreed to by the parties. The primary purpose of the order was to clarify the issues in dispute and organize the presentation of evidence. The parties also stipulated, however, that the developer satisfies one of the three jurisdictional requirements found in 760 CMR 31.01(1), namely that the developer controls the site. Pre-Hearing Order (Sep. 15, 2005), § II-3.

and that the developer be a limited dividend organization. See 760 CMR 31.01(1)(a), 31.01(1)(b).

The developer has introduced into evidence the June 21, 2002 project eligibility letter from the Medford Co-Operative Bank under the New England Fund (NEF) of the Federal Home Loan Ban k of Boston (FHLBB). Exh. 3, Section 3. The NEF is a valid federal affordable housing program that establishes eligibility to apply for a comprehensive permit. *Transformations, Inc. v. Townsend*, No. 02-14 (Mass. Housing Appeals Committee Jan. 26, 2004); *Stuborn Ltd. Partnership v. Barnstable*, No. 98-01 (Mass. Housing Appeals Committee Decision on Jurisdiction Mar. 5, 1999). The project eligibility determination from the Medford Co-Operative Bank under the NEF establishes a presumption of fundability.[4] 760 CMR 31.01(2). This presumption has not been rebutted by the Board.

The requirement in § 31.01(1)(a) that the developer be a limited dividend organization is closely related to fundability because profit limitations are generally inherent in the subsidy program and because the role of the subsidizing agency is to ensure that the developer is a proper limited dividend organization at the time the project receives final subsidy approval. *Crossroads Housing Partnership v. Barnstable,* No. 86-12, slip op. at 9 (Mass. Housing Appeals Committee Mar. 25, 1987). The courts have concurred in our interpretation. *Maynard v. Housing Appeals Committee,* 370 Mass. 64, at 67, 345 N.E.2d 382 (1976); *Hanover v. Housing Appeals Committee,* 363 Mass. 339, 379, 294 N.E.2d 393, 420 (1973)("...the question of standards for eligibility as a limited dividend organization is

4. NEF proposals receiving project eligibility determinations after July 22, 2002 have been required to receive such determinations from a public or quasi-public entity. 760 CMR 31.01(2)(g), 31.10. The determination issued by the FHLBB member bank in this case is adequate, however, since it was issued June 21, 2002. The FHLBB approved the local member bank's request for an advance of funding, and has extended that approval. Exh. 36.

properly left to the appropriate State or Federal agency"). In its application for a comprehensive permit the developer stated that it "agrees to conform to the limited dividend requirements of Chapter 40B," and it attached a draft of the NEF regulatory agreement, which contains specific dividend limitation provisions in section 4. Exh. 3, Section 2. This commitment satisfies the limited dividend requirement.

We find that the developer has established jurisdiction under 760 CMR 31.01.

IV. LOCAL CONCERNS

When the Board has denied a comprehensive permit, the ultimate question before the Committee is whether the decision of the Board is consistent with local needs. Under the Committee's regulations, the developer may establish a *prima facie* case by showing that its proposal complies with state or federal requirements or other generally recognized design standards. 760 CMR 31.06(2). The burden then shifts to the Board to prove first, that there is a valid health, safety, environmental, or other local concern that supports the denial, and second, that such concern outweighs the regional need for housing.[5] 760 CMR 31.06(6); also see *Hanover v. Housing Appeals Committee*, 363 Mass. 339, 365, 294 N.E.2d 393, 413 (1973); *Hamilton Housing Authority v. Hamilton*, No. 86-21, slip op. at 11 (Mass. Housing Appeals Committee Dec. 15, 1988).

Three issues of possible local concern are raised in the Pre-Hearing Order—stormwater management, blasting, and issues concerning emergency access and roadway

5. The shift in burden of proof is based upon a presumption created by the town's failure to satisfy one of the statutory minima described in 760 CMR 31.04 (1) and (2). See 760 CMR 31.07(1)(e). Since in the rulings on the motions to dismiss the town was found not to have satisfied the statutory minima, they need not be addressed here.

design.[6] See Pre-Hearing Order, § IV-3.

A. Stormwater Management

The Board has raised a number of issues regarding the design of the stormwater management system.[7] There is concern because the system will discharge into a conservation and recreation area that is subject to flooding. Exh. 51, ¶¶ 2-5; Tr. IV, 42-45, 47. This concern is understandable since the design is aggressive. For instance, the major stormwater detention basin located behind the existing homes on Mayflower Road is not only large and close to the adjoining properties, but it has ten-foot-high, stepped walls. Exh. 55, ¶ 11 and fig. 1; 9, p. 8; Tr. IV, 62-64.

But the developer's expert testified that the design of the system conforms to the Department of Environmental Protection (DEP) Stormwater Management Policy, promulgated under the state Wetlands Protection Act (WPA), and further, when the project reaches the final design and construction phase, the developer is committed to making any modifications that might be necessary to bring the system into full compliance. Exh. 43, ¶ 32, Tr. IV, 56. The Board's expert, on the other hand, concluded that the system as currently designed does not meet those standards. Exh. 48, ¶ 7. The Board has not gone beyond this, however, and drawn our attention to any local bylaw or other requirement pertaining to

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6. In its brief, the Board raised the question of whether the water main supplying the development should be looped. This was not included in the Pre-Hearing Order, however, and has therefore been waived. Pre-Hearing Order (Sep. 15, 2005), § IV-2, IV-3, IV-6.

7. We are not concerned, as the Board's expert was, that the drainage basin maps were drawn to an unusual scale. See Exh. 48, ¶ 6; 55, ¶ 2. Clearly, the expert witnesses presented by both sides of this dispute are well qualified. We have no reason to question the plans drawn by the developer's expert. The Board also questioned his use of a computer program that he designed himself, but in fact this is an indication of the high level of his expertise. See Exh. 55, ¶ 5. Instead of a degree in civil engineering, which is more typical of those who design stormwater management systems, the witness is a certified hydrologist and an environmental scientist with separate masters and doctoral degrees in geophysics and geology, respectively. Exh. 43-A; 55, ¶ 6.

stormwater. Therefore, we need not determine which expert is more credible. *Canton Property Holding, LLC v. Canton*, No. 03-17, slip op. at 23 (Mass. Housing Appeals Committee Sep. 20, 2005). In the absence of exceptional circumstances, the Board should not be permitted to place additional restrictions on affordable housing with regard to a matter that has not been regulated locally previously. *9 North Walker Street Development, Inc. v. Rehoboth*, No. 99-03, slip op. at 9-10 (Mass. Housing Appeals Committee Jun. 1, 2003), *remanded on other grounds*, No. CV2003-0767 (Bristol Super. Ct. Dec. 28, 2004). Nor is it the role of either the Board or this Committee to adjudicate compliance with state standards.[8] The developer is committed to preparing a final design that meets state stormwater standards, and no local concern has been raised that would outweigh the regional need for housing.

B. Blasting

To construct the roadways on the site, a significant amount of blasting and removal of the granite bedrock (23,600 cubic yards) is required. Exh. 7, pp. 4-5. The Board is concerned that this could damage a 60-to-80-yeqr-old municipal water tower at the top of the hill. Exh. 9, p. 14; 50, ¶ 4. The senior engineer for the town water and sewer department testified that "blasting is by its nature somewhat unpredictable," and that "[e]xcessive vibration from the

8. Normally, any factual questions with regard to whether the final design or construction actually complies with state law are resolved in the first instance by the local conservation commission, with further review available before the DEP. The case before us, however, is unusual. Because the wetlands are at considerable distance from the site, the proposal does not fall under the jurisdiction of the Wetlands Protection Act. Were we ultimately to rule in favor of the developer in this case, it would be necessary to ensure compliance with the standards that the developer has agreed to conform to. Typically, if we were satisfied that the preliminary plans complied with the requirements contained in Stormwater Management Policy, we would impose our own condition requiring this, and it then would be enforced by the town, following its normal procedures in evaluating final construction plans and monitoring construction. That would normally be done by the building inspector, the town engineer, the conservation agent, or another appropriate town official, and any disputes that might arise would be reviewable first by the Board, then by this Committee, and ultimately by the courts.

blasting could damage the water tower," resulting in disruption of municipal water supply in the surrounding area and possible flooding of nearby homes." Exh. 50, ¶ 4. He did not testify in detail with regard to the blasting that is proposed. The Braintree Fire Department has Blasting Permit Requirements that incorporate the state requirements in 527 CMR 13.00 and impose additional requirements. Exh. 39. No discussion of blasting was included in the deputy fire chief's testimony, however. See Exh. 49.

The developer has prepared an extensive Blasting Impact Report, which analyzes the site, evaluates the blasting required, and makes recommendations, including technical specifications, for the blasting operations. Exh. 7, pp. 4-6. The report also establishes two commitments that the developer and its contractors will be held to. First, "[t]he blasting operations… shall conform to the provisions of [G.L., c.] 148 and 527 CMR 13.00, the provisions set by the Braintree Fire Department, and this Blasting Impact Report. In case of a conflict among any of the … requirements, the Blasting Contractor shall comply with the strictest applicable… requirements…." Exh. 7, p. 5. Second, "[t]he Contractor shall obtain written permission and approval of method from local authorities before proceeding with blasting." Exh. 7, p. 7.

No specific evidence has been presented by the Board that the blasting cannot be safely accomplished. Rather, what is left for resolution is only the routine procedures for conducting the blasting operations safely. Since all local requirements will be complied with fully, no local concern has been raised that would outweigh the regional need for housing.

C. Emergency Access and Roadway Design

The most problematic aspect of the proposed design is emergency access to the development. The design of the development's single access road is constrained by the fact that for its first 200 feet, the developer controls only a 40-foot-wide right of way between two

existing houses on Liberty Street.[9] Exh. 4-A, sheet 2; 42, ¶ 5. The proposed roadway turns off Liberty Street at a right angle, and after about 100 feet, curves to the right. Exh. 4-A. Within the 40-foot right of way, the developer proposes to construct two 14-foot-wide travel lanes separated by a 4-foot-wide mountable paved island, with sidewalks on either side.[10] Exh. 42, ¶ 5. Beyond the first 200 feet, the right of way becomes 70 feet wide, and the roadways, for their remaining length, have two 18-foot-wide travel ways separated by a 16-foot-wide mountable landscaped island, which complies with the Braintree Subdivision Rules for Type 3 roadways. Exh. 42, ¶ 8, 14; Tr. IV, 119. The maximum grade of the roadways is 8%, which is greater than the 6% limit established for Type 3 roadways in the subdivision rules. Exh 42, ¶ 11. The roadways are both cul-de-sacs, one 1,550 feet long, and the other 1,250 feet long. Exh. 42, ¶ 6.

The developer's expert, a civil engineer, testified unequivocally that in his opinion the "proposed roadway dimensions [near the entrance] present no health or safety issues...," that "the roadway grades... will not impede ... safe passage...," and that "the risk that emergency vehicles will be blocked... is negligible." Exh 42, ¶¶ 5, 11, 14; also see Exh. 54, ¶¶ 2.

The town planner, on the other hand, testified that because there is an increased risk that the entrance area will be blocked in an emergency by a disabled motor vehicle or a fallen tree, because of the large number of units in the development, and because of the length of the dead-end streets, there is an "unacceptable risk" to public safety. Exh. 47, ¶ 6. The

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9. Liberty Street is an undivided, suburban road approximately 25 feet wide. Exh. 42, ¶5.

10. It appears that in considering a previously submitted subdivision plan, the town found an entrance roadway with a pavement width of 30 feet to be acceptable. Exh. 46, ¶ 5.

Braintree deputy fire chief joined in this opinion.[11] Exh. 49, ¶¶ 4, 6.

As a preliminary matter, it is important to clarify that the proposal before us does not include secondary emergency access from the rear, even though the developer made an offer to provide such access. In prefiled testimony, the developer offered to redesign one of the cul-de-sacs to provide access from the rear by extending a presently unimproved road that services the water tower located at the very top of the hill. Exh. 46, ¶ 6. But an offer to provide access is not a plan that shows such access. See 760 CMR 31.02(2)(a). Though the water tower is shown on the plans, the developer provided no plans for the changes in the road. Tr. IV, 87-90, 105; also see e.g., Exh. 4-A, 4-C, 4-D. If the change being proposed were very straightforward, such as simply adding or removing a gate on an already designed emergency access road, under some circumstances we might permit it to be made through testimony, late in the hearing process. But in this case, on this site, provision of emergency access is complicated. The emergency roadway would rise steeply to a point near the top of the hill, go over the crest, and descend steeply to connect with the primary roadway, with both slopes appearing to be about 10%. Exh. 46, ¶ 6; 47, ¶ 8; cf. Exh. 54, ¶ 5 (testimony acknowledging the 10% grade, but opining that access is "entirely feasible"). The deputy fire chief was concerned that the grade of any emergency access that might be designed would too steep. Exh. 49, ¶ 5; cf. Tr. IV, 101. No design has been provided that is specific enough for the Board to respond to or for us to evaluate in a meaningful way, and thus we conclude

11. The deputy fire chief also testified that the layout of the roadway would require a fire truck turning into the development to swing into the opposing lane of traffic. Exh. 49, ¶ 3. This is not disputed by the developer's expert, though his opinion was clearly that this would be a minimal inconvenience. Exh. 54, ¶¶ 4, 8-9. We agree that this design weakness alone is not a local concern sufficient to outweigh the regional need for housing. See *Cirsan Realty Tr. v. Woburn*, No. 01-22, slip op. at 9 (Mass. Housing Appeals Committee Jun. 11, 2003), *aff'd* No. 03-2872 (Middlesex Super. Ct. Jun. 10, 2004).

that the proposal before us does not include secondary access.[12]

Braintree subdivision regulations limit the length of cul-de-sacs to 400 feet.[13] This evidences a concern about emergency access when homes may become isolated from the town's street network because of a single point of entry to the development, and it is clearly a legitimate concern. It is a concern that increases not only with the length of the cul-de-sac, but also with the number of homes that are located at a distance from the street network. Each such roadway must be considered on its own merits based upon "an analysis of all the characteristics of the roadway taken together." *Lexington Woods, LLC v. Waltham*, No. 02-36, slip op. at 19 (Mass. Housing Appeals Committee Feb. 1, 2005)(upholding denial of comprehensive permit for a steep, winding, 1,000-foot roadway serving 36 townhouse condominium units). In this case, the roadways themselves present no insurmountable design problems other than that they are cul-de-sacs.[14] But approximately one hundred units of housing will be located beyond the standard established by the town, some as far as 1,500 feet from Liberty Street. Based upon our evaluation of these facts and of the opinion testimony of the witnesses, we conclude that the concern for emergency access outweighs the regional need for affordable housing.

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12. The Board also argues that the Land Court has found that the developer has easement rights only to part of the development parcel. Board's Brief, p. 9; also see *O.I.B. Corp. v. Planning Board of the Town of Braintree*, Nos. 231231, 250766 (Mass. Land Court Jan. 28, 2000)(Exh. 12). The developer's failure to allay these concerns is also an indication that its offer to provide emergency access would need to be developed in much more detail before such access could be considered part of the proposal.

13. This requirement applies to Type 1 roadways. Exh.47, ¶ 6. Emergency access is less of an issue with Type 3 roadways, that is, boulevards. But the developer cannot avail itself of the less stringent requirements for boulevards since the limiting factor in the design here is at the entrance, the "bottleneck," where the roadway does not conform to the Type 3 width requirements. See Exh. 47, ¶ 6; 42, ¶ 8.

14. This certainly does not mean, however, that the roadway is well designed. On the contrary, on the one hand, the boulevard design appears excessive, and on the other, the entrance is poorly designed.

V. CONCLUSION

For the foregoing reasons, we conclude that the decision of Board denying the request for a comprehensive permit is consistent with local needs, and accordingly it is affirmed.

This decision may be reviewed in accordance with the provisions of G.L. c. 40B, § 22 and G.L. c. 30A by instituting an action in the Superior Court within 30 days of receipt of the decision.

Housing Appeals Committee

Date: March 27, 2006

Werner Lohe, Chairman

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